



IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 605

JACOB SIEGEL COMPANY,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

**BRIEF FOR AMICUS CURIAE IN SUPPORT OF
PETITIONER'S APPLICATION FOR A WRIT OF
CERTIORARI TO THE CIRCUIT COURT OF THE
UNITED STATES, THIRD CIRCUIT**

SEYMOUR M. KLEIN,
Attorney for Amicus Curiae,
150 Broadway,
New York, New York.

MARSHALL, BRATTER, SELIGSON & KLEIN,
of Counsel.

MARVIN J. BLOCK,
on the Brief.

INDEX

	PAGE
BRIEF FOR AMICUS CURIAE	1
Preliminary Statement	2
The Statute	3
The Power of the Circuit Court over Punitive Orders	14
No Contradiction by Qualifying Language	19
The Commission's Order is not Justified by the Evidence	21
CONCLUSION	24

Table of Cases

American Chain & Cable Co. Inc. v. Federal Trade Commission, 142 Fed. (2nd) 909 (C. C. A. 4th 1944)	18
Ardelle Inc. v. Federal Trade Commission, 101 F. (2d) 718 (C. C. A. 9th 1939)	7
Bear Mill Mfg. Co. Inc. v. Federal Trade Commis- sion, 98 F. (2d), 67 (C. C. A. 2d 1938)	5
Charles of the Ritz Distributors Corp. v. Federal Trade Comm., 143 F. (2d) 676 (C. C. A. 2d 1944) ..	8, 9
Commissioner of Internal Revenue v. F. G. Bonfils Trust, 115 Fed. (2nd) 788, 792 (C. C. A. 10th 1940) .	13
Consolidated Edison v. National Labor Relations Board, 305 U. S. 197 (1938)	14
D. D. D. Corp. v. Federal Trade Commission, 125 F. (2d) 679 (C. C. A. 7th 1942)	6
Etalissements Regaud Inc. v. Federal Trade Com- mission, 125 F. (2d) 590 (C. C. A. 2d 1942)	5
Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67 (1934)	20

Federal Trade Commission v. Army & Navy Trading Co., 88 F. (2d) 776 (App. D. C. 1937)	20
Federal Trade Commission v. Cassoff, 38 F. (2d) 790 (C. C. A. 2nd 1930)	5, 20
Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568 (1923)	18 fn.
Federal Trade Commission v. Eastman Kodak Co., 247 U. S. 619 (1927)	15
Federal Trade Commission v. Good Grape Co., 45 F. (2d) 70 (C. C. A. 6th 1930)	5, 20
Federal Trade Commission v. Hires Turner Glass Co., 81 F. (2d) 362 (C. C. A. 3rd 1935)	5, 10 fn., 13 fn.
Federal Trade Commission v. Midwest Mills Inc., 90 F. (2d) 723 (C. C. A. 7th 1937)	5, 10 fn., 13 fn.
Federal Trade Commission v. Royal Milling Co., 288 U. S. 212 (1933)	5, 9, 13, 16, 20
Fluegelman & Co. v. Federal Trade Commission, 32 F. (2d) 559 (C. C. A. 2nd 1930)	5, 10 fn., 13 fn., 20
Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 373 (1938)	14
Gelb v. Federal Trade Commission, 144 F. (2d) 580 (C. C. A. 2d 1944)	8, 9
Heald v. District of Columbia, 254 U. S. 20 (1920)	12
Hecht v. Malley, 265 U. S. 144, 153 (1924)	12
Herzfeld v. Federal Trade Commission, 140 F. (2d) 207 (C. C. A. 2d 1944)	5 fn., 6 fn., 8, 9
International Assn. of Machinists v. National Labor Relations Board, 311 U. S. 72 (1940)	6 fn.
International Mine Workers v. Eagle Picher Mining & Smelting Co., 325 U. S. 335 (1945)	18
Johnson v. Manhattan Ry. Co., 289 U. S. 479, 500 (1933)	12
Latimer v. U. S., 223 U. S. 541 (1912)	13

Lee Boyer's Candy v. Federal Trade Commission, 128 F. (2d) 261 (C. C. A. 9th 1942)	7
Louisville Cement Co. v. Interstate Commerce Commission, 246 U.S. 638, 644 (1917)	13
New York Knitting Mills, Incorporated v. Gotham Knitting Mills, Incorporated, 37 U. S. Patent Quarterly, p. 459 (1938)	19 fn.
New York Knitting Mills, Incorporated v. Rosenna Knitted Sportswear, 37 U. S. Patent Quarterly, p. 460 (1938)	19 fn.
N.L.R.B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 257 (1930)	15
Parke, Austin & Lipscomb v. Federal Trade Comm., 142 F. (2d) 437 (C. C. A. 2d 1944)	8, 9
Phelps-Dodge Corp. v. National Labor Relations Board, 313 U. S. 177 (1941)	6 fn.
Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7 (1940)	14, 15
Southern Steamship Co. v. N.L.R.B., 316 U. S. 31 (1942)	14
Ultra Violet v. Federal Trade Commission, 143 F. (2d) 814 (C. C. A. 9th 1944)	6
U. S. v. Lexington Mill Co., 232 U. S. 399 (1913)	13
U. S. v. Morgan, 307 U. S. 183, 191 (1939)	14
Washington Market Co. v. Hoffman, 101 U. S. 112 (1879)	13

Statutes

15 U. S. C. A., Secs. 45 (a), (c), (d)	4
38 Stat. 719, Sec. 5	11
52 Stat. 111, Sec. 5	4
52 Stat. 111, Sec. 5(c)	11
52 Stat. 111, Sec. 5(d)	12

Authorities

	PAGE
McFarland, Judicial Control of the F. T. C. and the Interstate Commerce Commission (1933)	18 fn.
Roscoe Pound, Administrative Law and the Courts, 24 Boston U. L. Rev. 201 (1944)	17 fn.
Senate Report No. 221, Vol. I, Senate Reports on Public Bills, etc. Serial No. 10076	10 fn.
Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harvard Law Review 70	18 fn.
Warner, An Approach to the Extent of Judicial Su- pervision Over Administrative Agencies, 28 Geo. L. J. 1042, 1073 (1940)	17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945

No. 605

JACOB SIEGEL COMPANY,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

**BRIEF FOR AMICUS CURIAE IN SUPPORT OF
PETITIONER'S APPLICATION FOR A WRIT OF
CERTIORARI TO THE CIRCUIT COURT OF THE
UNITED STATES, THIRD CIRCUIT**

This brief is submitted on behalf of a group of retail stores which are outlets for petitioner's topcoats and overcoats sold under the trade name of "Alpacuna". They appeared as *Amicus Curiae* in the Court below and were represented by counsel both at the original argument and upon the reargument. They now appear in support of the petition for a writ of certiorari upon the consent of the parties hereto.

The stores which appear are: Arnold Constable & Company, Incorporated, New York City; A. H. Benoit & Company, Portland, Maine; The William H. Block Company, Indianapolis, Indiana; Gimbel Brothers, Philadelphia, Pa.; The Larkey Company, Inc., Newark, New Jersey; Metropolitan Company, Dayton, Ohio; Maurice L. Rothschild, Chicago, Ill.; Samter Bros. Co., Scranton, Pa.; Harry Suf-
frin, Detroit, Michigan.

The interest of *Amicus Curiae* herein was set forth in the opinion of the Circuit Court as follows:

"A group of retail stores who handle the 'Alpacuna' coats have filed a brief, as *amici curiae* in support of the petitioner's stand. Those stores set out that they have a very definite interest in the retention of the name by reason of co-operation in extensive advertising and selling the product over a period of years and that the barring of the use of the name 'Alpacuna' is a matter of serious detriment and direct prejudice to them" (R. p. 895).

Amicus Curiae respectfully calls this Court's attention to the fact that over eighty retail stores throughout the country, in addition to those specifically included as *Amicus Curiae*, have indicated to us their great interest in the preservation of the trade name of "Alpacuna". They have also stated that the name is of real value and that the prohibition of its use would involve a serious loss to them*.

Preliminary Statement

The Circuit Court, in its original opinion, evidently against its inclinations, stated that it felt constrained to follow the Second Circuit's view of the respective powers of the Commission and the Circuit Court.

Expressing dissatisfaction with that part of the Commission's order which destroyed petitioner's valuable trade

* In answer to a query these stores have stated that no customer of theirs has ever complained of being misled by the trade name "Alpacuna". Cf. result of poll in a New York Department store where over 200 customers chosen at random were questioned and not one of them declared that the name "Alpacuna" indicated vicuña to them (See R. p. 893, Circuit Court's opinion).

name built up over a period of years and at tremendous expense, the Court wrote:

“* * * we think strongly that the order is far too harsh.” (p. 898)

Later the Court stated:

“* * * if we were still in control of the remedy we would modify the order as above indicated.” (p. 902)

The Court further observed:

“The infraction, as the case now stands is slight and could be cured by simple and qualifying language.” (p. 898)

And again, as though weighing possible injury to the “substantial portion of the purchasing public” as against destruction of this valuable trade name of the petitioner, the Court stated:

“It destroys a widely favorable known trade name in existence for 14 years. It causes serious injury to the petitioner and its retail outlets.” (p. 898)

Notwithstanding its expressed disagreement with the order and the rule, the Court affirmed the Commission's order without modification and, upon rehearing, felt constrained to abide by that decision.

The Statute

The relevant portions of the Act here involved are:

“(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

"The Commission is hereby empowered and directed to prevent persons * * * or corporations * * * from using unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce."

15 U. S. C. A. Sec. 45 (a);
52 Stat. 111, Sec. 5.

"(c) Any person, * * * or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, * * * by filing in the court, * * * a written petition praying that the order of the Commission be set aside * * *. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, *modifying* or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * *." (Italics ours.)

15 U. S. C. A. Sec. 45 (c);
52 Stat. 111, Sec. 5.

"(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."

15 U. S. C. A. Sec. 45 (d);
52 Stat. 111, Sec. 5.

It is respectfully submitted that the Circuit Court had the power under the Federal Trade Commission Act to enter the modification sought herein.

The last and leading case in this Court dealing with the power of a court to modify a Federal Trade Commission order is *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933). Since that decision, no Federal Trade Commission case has been decided in the Supreme Court which deviates in any way from the rule enunciated therein. Furthermore, a study of the cases in the Supreme Court since that time reveals no opinion which has even distinguished or mentioned the *Royal Milling* case with disfavor.

Federal Trade Commission v. Royal Milling Co., *supra*, cited with approval cases arising in various Circuits in which orders of the Commission had been modified: *Fluegelman & Co. v. Federal Trade Commission*, 32 F. (2d) 59 (C. C. A. 2nd 1930); *Federal Trade Commission v. Cassoff*, 38 F. (2d) 790 (C. C. A. 2nd 1930); *Federal Trade Commission v. Good Grape Co.*, 45 F. (2d) 70 (C. C. A. 6th 1930).

Thereafter, courts in every Circuit wherein similar cases arose applied the rule of modification established by the *Royal Milling Co.* case: *Federal Trade Commission v. Hires Turner Glass Co.*, 81 F. (2d) 362 (C. C. A. 3rd 1935); *Etablissements Regaud, Inc. v. Federal Trade Commission*, 125 F. (2d) 590 (C. C. A. 2d, 1942); *Bear Mill Mfg. Co. Inc. v. Federal Trade Commission*, 98 F. (2d), 67 (C. C. A. 2d 1938); *Federal Trade Commission v. Midwest Mills, Inc.*, 90 F. (2d), 723 (C. C. A. 7th 1937).

Suddenly and without any previous indication, in 1944, one Circuit* considered itself powerless to follow the *Royal Milling* case any longer despite the fact that this court had never itself taken that position. This unwarranted and unwise departure has not been followed in other Circuits in Federal Trade Commission cases.

* Exemplified by *Herzfeld v. Federal Trade Commission*, 140 F. (2d) 207 (C. C. A. 2d 1944).

Thus, in the Ninth Circuit, in *Ultra Violet v. Federal Trade Commission*, 143 F. (2d) 814 (C. C. A. 9th 1944), the court, although finding that the Commission's order was based on substantial evidence, refused to enforce a portion of it on the ground that it was too broad and unfair to the petitioner. It further modified the order as requested to eliminate the over-reaching effect of the prohibition on petitioner's advertising in one particular. It is significant to note that the Federal Trade Commission failed to apply for a writ of certiorari in that case but now maintains, in the case at bar, that there is no power in this court to modify.

The rule of the Second Circuit as to "no power" apparently was based on certain decisions under the National Labor Relations Act.* This rule in labor cases became clear in 1940.** However, in 1942, two years later, the Seventh Circuit in a Federal Trade Commission case modified an order of the Commission on the ground that it was unreasonable and "would serve no purpose in the protection of the public, but might limit petitioner in truthfully representing its product." The dissenting opinion in the case particularly demonstrates that the decision is one where the court disagrees with the Commission as to the nature and extent of the order required to remedy the evil complained of. Yet the majority feels free to modify in accordance with its own views.

D. D. D. Corp. v. Federal Trade Commission, 125 F. (2d) 679 (C. C. A. 7th 1942).

* The *Herzfeld* case cited as its first two authorities: *International Assn. of Machinists v. National Labor Relations Board*, 311 U. S. 72 (1940) and *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177 (1941).

** The *International Assn. of Machinists v. National Labor Relations Board*, *supra*, was decided November 12, 1940.

Again, the Commission failed to apply for a writ of certiorari to this court.

Also in 1942, two years after the labor case rule was established, the Ninth Circuit in *Lee Boyer's Candy v. Federal Trade Commission*, 128 F. (2d) 261 (C. C. A. 9th 1942), modified an order of the Federal Trade Commission. The Commission's order forbade petitioner from distributing merchandise so packed and assembled that ~~sales of it to the public~~ "are to be made or may be made by means of a game of chance, gift enterprise or lottery scheme." The court expunged the words "may be made" on the ground that the order thus written was too broad.

It is interesting to note that the Commission, on page 11 of its brief, argued:

"The Commission is entitled to enter an order broad enough to prevent evasion."

Further, on page 15 of its brief, it protested:

"Such an opinion will in every sense afford petitioner as much protection as would a modified order to cease and desist at the same time avoiding a modification which will have 'the effect of leaving a loop-hole for evasion which is certainly closed and no more than closed by the use of the words in controversy.' "

Yet the court, following its previous decision in *Ardelle Inc. v. Federal Trade Commission*, 101 F. (2d) 718 (C. C. A. 9th 1939) and rejecting decisions of other courts which affirmed identical orders of the Commission without modification, modified the order as indicated above. Despite its strong protest in the Circuit Court the Federal Trade Commission failed to petition this court for a writ of certiorari.

It thus appears that the Seventh and Ninth Circuits still feel free to modify Federal Trade Commission orders when the occasion warrants. Moreover, even in the Second Circuit where the rule has been laid down which in effect makes the Federal Trade Commission the final authority as to remedy there is a good deal of confusion, if not outright disagreement, among the judges themselves.

For instance, in *Gelb v. Federal Trade Commission*, 144 F. (2d) 580 (C. C. A. 2nd 1944), the Commission had issued a cease and desist order part of which prohibited petitioner from representing that his preparation reconditioned the hair. The court stated that the Commission had found that the preparation in question was incapable of performing this function. Nevertheless, the court modified the order so as to permit the petitioner to employ the phrase "recondition the hair." The majority attempted to make it appear that the modification was based upon a lack of substantial evidence with regard to the particular in question. However, a reading of the most vigorous dissent by Judge Clark in that case reveals that he regards the majority opinion as being in contravention of the "no power" rule adopted in 1944. Judge Clark's precise, emphatic words were:

"Hence, even if we had control over the Commission's choice of remedy, I should think it quite a mistake to exercise it here. But we have protested most strongly and steadily recently that we have no such control. *Herzfeld v. Federal Trade Commission*, 2 Cir., 140 F. 2d, 207; *Parke, Austin & Lipscomb v. Federal Trade Comm.*, 2 Cir., 142 F. 2d, 437; *Charles of the Ritz Distributors Corp. v. Federal Trade Comm.*, *supra*."

It is significant to note that Judge Clark wrote the majority opinion in the *Charles of the Ritz* case* and concurred in the *Parke, Austin & Lipscomb* case,** both of which followed the *Herzfeld* rule.

Thus, it becomes clear that in this one Circuit, which has refused in Federal Trade Commission cases to follow the *Royal Milling* decision, there is confusion and even disagreement in the court itself.

A fair analysis of the *Gelb* decision leads to the conclusion that the Second Circuit which has in words enunciated the *Herzfeld* doctrine, in action will modify an order of the Commission when it disagrees strongly enough with it.

Statutory Construction

When recourse is had to the statute itself which governs the relationship between Court and Commission, the right of the court to modify Commission's orders would appear clear.

Section 5 of the Federal Trade Commission Act states that the jurisdiction of the Circuit Court of Appeals to modify orders of the Commission shall be exclusive and that the Court shall have the power to make and enter upon the pleadings a decree modifying the order of the Commission.

"To modify" has been defined in Funk & Wagnall's Standard Dictionary as:

"1. To make somewhat different; change more or less in character, properties, form or application; limit or restrict; vary; as to modify the de-

* 143 F. (2d) 676 (C. C. A. 2d 1944).

** 142 F. (2d) 437 (C. C. A. 2d 1944).

tails of a plan. 2. To make more moderate or less sweeping; reduce in degree or extent; qualify; as to modify a punishment."

The original Act creating the Federal Trade Commission was adopted in 1914. That Act was not substantially amended or changed in any respect until 1938 when, after careful consideration of various decisions which had been handed down by this Court and Circuit Courts in the intervening period, and upon request of the Federal Trade Commission, the Act was substantially amended to strengthen and enlarge the jurisdiction of the Federal Trade Commission and to include provisions relating to the finality of the Federal Trade Commission orders. The amending statute, introduced in the United States Senate, was reported by the Committee on Interstate Commerce to the 75th Congress, First Session.* That report contained a letter from the Acting Chairman of the Federal Trade Commission, dated February 11, 1936, discussing at length the proposed amendments and particularly the amendments to Section 5 of the Federal Trade Commission Act. Reference is therein made to many decisions of this Court and of the Circuit Courts, but no reference whatsoever was therein made, nor any exception taken, to the existing decisions whereunder it had been held that the Circuit Court did have the power to modify orders of the Federal Trade Commission.**

* Senate Report No. 221, Vol. I, Senate Reports on Public Bills, etc. Serial No. 10076.

** *Federal Trade Commission v. Hires Turner Glass Co.*, 81 Fed. (2nd) 362 (C. C. A. 3rd, 1935); *Federal Trade Commission v. Midwest Mills, Inc.*, 90 Fed. (2nd) 723 (C. C. A. 7th, 1936); *Fluegelman v. Federal Trade Commission*, 32 Fed. (2nd) (C. C. A. 2nd, 1930).

The Act, as finally adopted after conference report of the two Houses of Congress, is of exceptional significance in that Congress *specifically retained* the power in the Circuit Court to modify orders of the Federal Trade Commission. In columnar form, we set forth below excerpts from the Act, more particularly portions of Section 5 thereof, as the same existed prior to the amendment in 1938 and as the same read after the 1938 statute.

38 Stat. 719

Sec. 5 (p. 720)

* * *

"* * * Any part required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript *the court shall have the same jur-*

52 Stat. 111

Sec. 5(c).

"(c) Any person, * * * or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, * * * by filing in the court, * * * a written petition praying that the order of the Commission be set aside * * *. Upon such filing of the petition and transcript *the court shall have jurisdiction* of the proceeding and of the question determined therein, *and shall have power to make and enter* upon the pleadings, evidence, and proceed-

isdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

“The jurisdiction of the circuit court of appeals of the United States *to enforce, set aside, or modify* orders of the commission shall be exclusive.”

ings set forth in such transcript *a decree affirming, modifying or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * *.*”

“(d) The jurisdiction of the circuit court of appeals of the United States *to affirm, enforce, modify, or set aside* orders of the Commission shall be exclusive.”

Here, then, is an amendment to the Act expressly recognizing and reenacting the Court's power of modification.

It is a well-recognized rule of statutory construction that where a legislature enacts a statute amending an existing law, it is presumed to have been cognizant of Court interpretations of that law. Any attempted alteration of judicial construction of the prior law must be expressed in clear and appropriate language, otherwise the statute will continue to be interpreted as theretofore by the Courts.

Johnson v. Manhattan Ry. Co., 289 U. S. 479, 500 (1933);

Hecht v. Malley, 265 U. S. 144, 153 (1924);

Heald v. District of Columbia, 254 U. S. 20 (1920);

Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 644 (1917);
Latimer v. U. S., 223 U. S. 541 (1912);
Commissioner of Internal Revenue v. F. G. Bonfils Trust, 115 Fed. (2nd) 788, 792 (C. C. A. 10th, 1940).

Moreover, it is a basic rule of statutory construction that each word in a statute must be given its full significance.

U. S. v. Lexington Mill Co., 232 U. S. 399 (1913);
Washington Market Co. v. Hoffman, 101 U. S. 112 (1879).

The *Royal Milling* case was the supreme law of the land at the time of the enactment of the 1938 Wheeler-Lea Amendment to the Federal Trade Commission Act. Its doctrine was being followed by the various circuits.*

Had the legislature intended to circumscribe the power of the court to modify orders of the Commission, it would have used appropriate language to that end. It is presumed to have acted with knowledge of those decisions and their effect. However, rather than limiting the powers of the Court the legislature utilized language which clearly comprehended the Court's powers and manifestly extended them for future application.

It is, therefore, respectfully submitted that an analysis of the *Royal Milling* case and the decisions in the various Circuits following thereupon, as well as the Federal Trade Commission Act itself, and as amended, establishes the proposition that this Court has the power to modify the instant order in the manner contended for herein.

* *Federal Trade Commission v. Hires Turner Glass Co.*, 81 Fed. (2nd) 362 (C. C. A. 3rd, 1935); *Federal Trade Commission v. Midwest Mills, Inc.*, 90 Fed. (2nd) 723 (C. C. A. 7th, 1937); *Fluegelman v. Federal Trade Commission*, 32 Fed. (2nd) 59 (C. C. A. 2nd, 1930).

The Power of the Circuit Court Over Punitive Orders

It is not inappropriate at this point to consider in connection with the problem of the Circuit Court's power of modification of the Commission's order the power resident in that Court.

An enforcement proceeding of the type sought herein by the Commission is comparable to a proceeding in equity and in which the principles of equity must be applied.

U. S. v. Morgan, 307 U. S. 183, 191 (1939);
Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 373 (1938).

It has been uniformly stated that the functions of administrative orders is remedial and not punitive.

Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7 (1940);
Consolidated Edison v. National Labor Relations Board, 305 U. S. 197 (1938).

It is noteworthy that despite the apparent hard and fast rule in National Labor Relations cases with respect to the court's power of review over administrative remedies, this Court has applied the above principles to labor cases. Modification of National Labor Relations Board orders has been effected by the courts in two outstanding types of cases. These cases involved (1) re-instatement of employees, (2) back-pay to employees. In both instances the court has stressed the principle that affirmative action ordered by the Board must be designed to effectuate the purposes of the Act, and that its orders must be remedial rather than punitive. Recent decisions of this Court on this subject in which orders were modified are:

Southern Steamship Co. v. NLRB, 316 U. S. 31 (1942);

Republic Steel Corp. v. NLRB, 311 U. S. 7 (1940);

NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240, 257 (1930).

The dissents in the above-cited labor cases pointedly decried the majority's unjustifiable interference with the "discretion" Congress had vested in the administrative agency. The rationale of these decisions must lie in the rule that while the court may be restricted in its control over the orders of the Labor Board, yet the Board itself is circumscribed in that its orders must effectuate the purposes of the Act and be remedial rather than punitive in nature.

The stated purposes of the Federal Trade Commission Act are to prevent unfair competition and deceptive acts in commerce. These are not accomplished by the destruction of the business or property of an alleged violator. Its purposes would be effectuated by the removal of the misimpression or deception to the public. The result sought to be accomplished should be to protect the public to the utmost while, at the same time, injuring the charged party only insofar as absolutely necessary. Any other result would be punitive rather than remedial. It might well be that the deception, in the instant case, could be removed by a cease and desist order against the petitioner continuing in business. This would, of course, protect the public fully. On the other hand, the purposes of the Act would not be effectuated. The Act does not encourage the destruction of a business, trade name or other property right. It does demand the outlawing of unfair trade practices and deception to the public.

In *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619 (1927), we find this Court declaring itself on the limits of effectuating the purposes of the Federal Trade Commission Act by refusing to affirm an order of

the Federal Trade Commission ordering defendant to dispose of two plants which were employed as part of a scheme to monopolize the film trade.

In the case at bar, with the removal of any possible misinterpretation by the public as to, "Alpacuna" signifying a vicuna content, the further elimination of the trade name itself could serve no useful purpose at all to the public. Examination of the order of the Federal Trade Commission in the instant case demonstrates that the Commission has arrived at a punitive rather than a remedial result, warranting the court's review and modification. Petitioner desires to clarify any misimpression on the part of purchasing public regarding vicuna as one of the ingredient fibres in its coats. To do this it has volunteered to add the phrase "Contains No Vicuna" in a prominent manner and sub-joining the trade name "Alpacuna". As a matter of fact, petitioner has already put this into effect and this court's attention is respectfully called to the labels which are affixed to the petitioner's brief.

Here, then, is a method for destroying the misimpression and at the same time preserving the trade name. A method which remedies the wrong without needless punishment. Here is a method which effectuates the purposes of the Act by removing the sole alleged deception without depriving the petitioner and *Amicus Curiae* of the good will in this valuable trade name, built up over a period of years and at great expense.

The power of the court to modify the Commission's order, to deal equitably and effectively with the infraction in the instant case, stems from judicial decision and legislative enactment. The *Royal Milling* case is clear. The Act gives the court power to modify. "To modify" in the Act must mean more than innocuous modification, more than a mere grammatical or semantic alteration or rear-

rangement of the Commission's orders. There is no need for the institution of judicial review to fall into disrepute. Appellate judges need not confine themselves to "passive obedience" to administrative dictates.* The exercise of conscience and intelligence in any given situation requires the court to do more than merely stamp its blanket imprimatur upon any administrative order which comes before it for review.

Moreover, there is no reason automatically to apply the restraining rule of the National Labor Relations Board cases to Federal Trade Commission cases. One prominent writer concluding a thesis on judicial supervision over administrative agencies has stated:

"The approach suggested is a flexible doctrine of judicial review, the extent of which will vary from one agency to another dependent upon the function, exercise and the character of the individual and social interest involved, and will change in respect to a particular agency as the circumstances change."

Warner, *An Approach to the Extent of Judicial Supervision Over Administrative Agencies*, 28 Geo. L. J. 1042, 1073 (1940).

One difference between the effect of NLRB orders banning unfair labor practices and FTC orders banning the use of trade names is evident. An "unfair labor practice" is an excrescence. It is not part and parcel of a business. Its employment may lead to additional profits or may satisfy the inexorable whims or prejudices of an employer. But it is not that factor upon which a business is based. It can, therefore, be done away with without affecting the continuation of the business.

* See, Roscoe Pound, *Administrative Law and the Courts*, 24 Boston U. L. Rev. 201 (1944).

On the other hand, "Alpacuna", the trade name, is a vital part of the business itself. The two are almost inseparable. It is without economic realization to argue that petitioner's goods could be sold under another name. The same argument could be offered if the business were confiscated and the petitioner told that he still had the name and could therefore start a new business. The banning of a trade name assumes much more of a punitive aspect than would the barring of an unfair labor practice or the ordering of a defendant to deal with a particular union.

Consequently, prohibiting the use of a trade name immediately poses the question of "effectuation of the policy of the Act" just as would destruction of the business itself. The court has the right, the duty in fact, to remove the punitive effect of an order and to modify it so that it becomes remedial. This can be done in the instant case by modifying the order so as to permit the petitioner to use the trade name "Alpacuna" with the qualifying phrase "Contains No Vicuna".

The difference between the two agencies and the statutes creating them has in other circumstances been recognized.

International Mine Workers v. Eagle Picher Mining & Smelting Co., 325 U. S. 335 (1945);

American Chain & Cable Co. Inc. v. Federal Trade Commission, 142 Fed. (2nd) 909 (C. C. A. 4th, 1944).

Nor is the difference in court approach to different executive agencies and their powers unusual, or novel, although it may be the trend of decision, without any specific legislative authority therefor, to draw all agencies into the same circle or orbit.*

* See: Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harvard Law Review 70; McFarland, Judicial Control of the F. T. C. and the Interstate Commerce Commission (1933); *F. T. C. v. Curtis Publishing Co.*, 260 U. S. 568 (1923).

In view of the vast difference between the two agencies and their legislative history and the judicial treatment between the policies giving rise to their establishment, and the possible effects of their decrees upon business, and in view of the previous recognition by this and other courts of such distinctions, there exists no reason to conclude that, because the Circuit Court may be without power to modify an order of the National Labor Relations Board which is supported by substantial evidence, no such power exists with respect to orders of the Federal Trade Commission. In fact, it is clear and the Circuit Court so states, that the findings of fact made by the Commission can be translated effectively and equitably through a modified order giving consideration to the business interests of the respondent without in any sense being in derogation of the public interest.

No Contradiction by Qualifying Language

The Commission's argument that qualifying language cannot be used to contradict a trade name has no merit here. The word "Alpacuna" being meaningless* its con-

* It is the contention of the Commission that the "cuna" portion of "Alpacuna" signifies a vicuna content. As a matter of fact, the uncontradicted evidence as to the derivation of the name "Alpacuna" shows that the proper suffix is "una" and not "cuna". Even assuming the Commission's theory, "cuna" has no English meaning except to indicate a member of an obscure Indian tribe (Trial Examiner's Report, 11a). At the most it creates the impression of a soft fibre (R. 377a, 378a, 425a, 426a, 433a, 558a). It has been administratively declared that the "cuna" type trade name is "arbitrary and meaningless." (See remarks of Ass't. Commissioner of Patents in *New York Knitting Mills, Incorporated v. Gotham Knitting Mills, Incorporated*, 37 U. S. Patent Quarterly, p. 459 (1938); *New York Knitting Mills, Incorporated v. Rosenna Knitted Sportswear*, 37 U. S. Patent Quarterly, p. 460 (1938).) Cf. remarks of witness Richardson (R. 472a) who said that "una" in "Alpacuna" was as meaningless as "ena" in Wheatena.

tradiction would have to be meaningless. Herein lies the distinction between the case at bar and *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67 (1934). In the latter case, the word at issue was "white", a word of definite meaning. In our case, "Alpacuna", lacking any meaning cannot be contradicted by a phrase which does have meaning.

Further, even if there were to be attributed some meaning to the name "Alpacuna" as a combination of alpaca and vicuna, the explanatory phrase would still be proper. It has been established in Federal Trade Commission cases that if the trade name is not *per se* false, but is rather partially true and partially deceptive, qualifying language may be used to erase any possible deception.

Royal Milling Company v. Federal Trade Commission, 288 U. S. 212 (1933);

Federal Trade Commission v. Army & Navy Trading Co., 88 F. (2d) 776 (App. D. C. 1937).

In *Federal Trade Commission v. Army & Navy Trading Co.*, *supra*, the court, distinguishing such cases as the *Royal Milling Co.*, *Good Grape*, *Casoff* and *Fluegelman* cases from the matter at issue in that case, pointed out that in the former group of cases the selection of qualifying words effective to eliminate deception was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which were true and some untrue.

The court stated:

"Therefore, qualifying words could be chosen which would eliminate any deceptive representations and leave standing the truthful ones alone."

In the instant case, the sole portion of the name "Alpacuna" which is allegedly deceptive is the "cuna" suffix.

Certainly, any possible misimpression can quickly be eliminated by proper qualifying words, removing the alleged deceptive portion and leaving that which is admittedly truthful.

The Commission's Order is Not Justified by the Evidence

Entirely apart from any question of control over the remedy by the court, as such, *Amicus Curiae* respectfully submits that the order in the instant case should have been modified because it goes beyond the findings of fact and substantial evidence in the case.

Paragraph Nine of the Commission's findings contains the basis for the Commission's present order:

"The Commission, therefore, find that the name 'Alpacuna' is misleading and deceptive to a substantial portion of the purchasing public *in that* it represents or implies to such persons that respondent's coats contain material which they do not in fact contain." (Italics ours.) (R. 652a.)

That portion of the Commission's order which is in issue on this rehearing prohibits:

"Using the word 'Alpacuna' or any other word which in whole or in part is indicative of 'vieuna' to designate or describe respondent's coats; * * *"
(R. 655a).

The order transcends the findings of fact and the substantial evidence in the record in that it completely bars the use of "Alpacuna", whereas the evidence below merely shows that "Alpacuna" *standing alone* is allegedly deceptive to a substantial portion of the purchasing public. In fact, the record is even more narrowly restrictive and

affirmatively demonstrates through the Commission's own witnesses that a statement or explanation to the public that "vicuna" is not contained in the garments completely removes any possible misapprehension. An order prohibiting the use of "Alpacuna" *unless accompanied by qualifying phrase clearly indicating a lack of vicuna content* would thus conform both to the findings of fact and to the evidence in the case.

A striking example of the type of evidence adduced at the hearing sustaining the above contention appears in the testimony of Robert L. Cohen, a Commission witness, on cross-examination:

"A. And I would judge from that that it is alpaca and vicuna hair, with a cotton backing.

Q. Until you read the next sentence. Read that sentence. A. 'Alpacuna' is a registered trade name and is composed of alpaca, wool, and mohair pile on cotton backing.

Q. That is a perfectly clear description of what is in the coat? A. That is right.

Q. And it does not contain vicuna? A. That is right.

Q. So that no one reading that advertisement would have any doubt as to what was in that overcoat. A. That is true." (R. 214a.)

With regard to the record affirmatively showing no deception if proper qualification is made, we also respectfully refer the court to the testimony of Commission's witnesses Muchmore (R. 170a), Ballenger (R. 173a), West (R. 181a), Hardy (R. 184a), Ford (R. 255-6a), Test (R. 266-267a).

It is clear that the evidence below rested at the point that "Alpacuna" if *unexplained* was allegedly deceptive

to a substantial portion of the purchasing public. It is also evident that the record is without substantial evidence, in fact without any evidence at all, that "Alpacuna", when properly modified, is not deceptive. It is equally clear that the qualifying language "Contains No Vicuna", as offered herein, would completely eradicate any misapprehension of the consumer and any deception to the public.

It is, therefore, respectfully submitted that entirely apart from any considerations as to the power of the court over the remedy, as such, the order in this case should have been modified in order to conform to the findings of fact and the substantial evidence in the record. As it stands now that order is not based in substantial evidence.

The order should, at the very least have been modified so that it reads that the petitioner is prohibited from:

"Using the word 'Alpacuna' or any other word which in whole or in part is indicative of the word 'vicuna', without proper qualification indicating the absence of vicuna."

Accompanying the trade name with the phrase "Contains No Vicuna" would clearly dispel any possible inference of vicuna content. In this manner, due regard for the public, on the one hand, and consideration for the preservation of a valuable property right, on the other hand, would both be satisfied. This, we submit, is the only type of order which could be properly entered in this case in view of the present state of the record.

CONCLUSION

The Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

SEYMOUR M. KLEIN,
Attorney for Amicus Curiae.

MARSHALL, BRATTER, SELIGSON & KLEIN,
of Counsel.

MARVIN J. BLOCK,
on the Brief.